

BRISTOL BAY NATIVE CORP.

IBLA 82-1116
ANCSA VLS 78-30

Decided March 23, 1983

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting regional selection applications, AA-12415 and AA-12416, in their entirety, and village selections AA-6655-A through AA-6655-G in part.

Dismissed in part; affirmed in part.

1. Alaska: Navigable Waters: Generally -- Alaska Native Claims Settlement Act: Appeals: Jurisdiction -- Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally -- Alaska Native Claims Settlement Act: Navigable Waters

Under sec. 901(b) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1631(b) (Supp. IV 1980), no appeals board of the Department of the Interior has the authority to determine the navigability of water covering a parcel of submerged land selected by a Native corporation unless a determination by the Bureau of Land Management that the water covering a parcel of submerged land is not navigable was validly appealed to such a board prior to Dec. 2, 1980. A premature appeal does not constitute a valid appeal within the meaning of this provision.

2. Alaska Native Claims Settlement Act: Aboriginal Claims-Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally -- Alaska Native Claims Settlement Act: Navigable Waters

A regional corporation filing an application under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1976), may not rely upon aboriginal right as a

basis for conveyance of title to the bed of the lake, since the act under which the application was filed extinguishes all such rights. A regional selection application for land beneath a navigable lake is properly rejected, since title to the bed passed to the State of Alaska under the Statehood Act.

3. Alaska Native Claims Settlement Act: Native Land Selections:
Regional Selections: Generally -- Alaska Native Claims Settlement Act: Navigable Waters

A regional selection application is properly rejected where a current protraction diagram of the Bureau of Land Management indicates that the land applied for is beneath a navigable lake, even though the applicant contends the land described in the application is upland. Such rejection does not prejudice a Native village's selection of uplands surrounding the lake, even if subsequent survey of the land establishes that sections applied for contain uplands, since the Native village's conveyance will be conformed to the result of the survey and the Native village will receive title to such uplands.

APPEARANCES: John D. Foster, Esq., Anchorage, Alaska, for appellant; Robert Charles Babson, Esq., for the Bureau of Land Management; Michael W. Sewright, Esq., Anchorage, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On February 15, 1978, Bristol Bay Native Corporation (BBNC) appealed that part of a decision to issue conveyance (DIC) published at 43 FR 2669 (Jan. 18, 1978), to the extent that it charged against the land selection entitlements of appellant and Chignik River Limited the submerged portions of certain lands lying beneath Black Lake. Consideration of the appeal was suspended in anticipation of legislation concerning the chargeability of such land. These actions were predicated on the view that Black Lake was nonnavigable and subject to selection. Meanwhile, the Bureau of Land Management (BLM) conducted a further study and concluded that Black Lake was navigable. On June 25, 1980, BLM filed a document with the Alaska Native Claims Appeal Board (ANCAB) indicating that it would not object to the issuance of an order to the effect that BLM erroneously proposed conveyance to BBNC of the submerged land underlying Black Lake. On July 18, 1980, BBNC attempted to appeal the redetermination of navigability of Black Lake. On August 26, 1980, ANCAB remanded the case to BLM, noting that BBNC's notice

of appeal was premature as the BLM notice of redetermination is not a decision by BLM within the meaning of 43 CFR 4.1(5), and that BLM lacked jurisdiction to redetermine a published decision of the Department while that decision is under appeal within the jurisdiction of ANCAB. Therefore, BBNC's notice of appeal of July 18, 1980, was dismissed. The Board then remanded the case to BLM to determine the question of navigability of Black Lake.

By decision dated June 15, 1982, the Alaska State Office, BLM, modified and vacated in part its January 18, 1978, decision. It determined Black Lake to be navigable and rejected appellant's regional selection applications, AA-12415 and AA-12416 and the village selections of Chignik River Limited, AA-6655-A through AA-6655-G with respect to those lands shown on BLM's protraction diagram as being beneath Black Lake. That 1982 decision is the subject of BBNC's present appeal. ^{1/} Appellant asserts that BLM erred in determining Black Lake to be navigable, and consequently erred in rejecting BBNC's application for submerged lands in Black Lake. Appellant contends that even if Black Lake is navigable, the submerged lands were available for selection on the basis of aboriginal title. Appellant further contends that its applications should not have been rejected in their entirety because they include uplands adjoining Black Lake.

[1] The Bureau challenges the Board's jurisdiction to consider this appeal on the basis of the following provision in section 901(b) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1631(b) (Supp. IV 1980):

No agency or board of the Department of the Interior other than the Bureau of Land Management shall have authority to determine the navigability of water covering a parcel of submerged land selected by a Native Corporation or Native Group pursuant to the Alaska Native Claims Settlement Act unless a determination by the Bureau of Land Management that the water covering a parcel of submerged land is not navigable was validly appealed to such agency or board prior to December 2, 1980. [Emphasis added.]

In the absence of a valid appeal prior to December 2, 1980, this Board would have no jurisdiction to review BLM's determination of the issue of navigability. Appellant's 1978 appeal did not raise the issue of navigability; appellant accepted the nonnavigability determination, and only contended that the submerged land should not be charged against their land selection entitlement. In 1980, while the case was still in ANCAB's jurisdiction, BLM, changed its opinion and reached the conclusion that Black Lake was navigable. This conclusion was not in the form of a formal decision. Nevertheless, on July 18, 1980, appellant filed an appeal from this navigability redetermination. This 1980 appeal does not fall within the exception to the above statutory provision precluding jurisdiction of this Board for two reasons.

^{1/} ANCAB was abolished effective June 30, 1982, and its functions transferred to the Board of Land Appeals by Secretarial Order No. 3078, dated Apr. 29, 1982. Interim rules to govern IBLA's disposition of cases pending before ANCAB were published June 18, 1982. See 47 FR 26390.

First, the exception only applies from decisions holding that the water covering a parcel of submerged land is not navigable; the 1980 appeal concerns a determination that the lake was navigable. Secondly, that determination was not validly appealed. Since the 1978 appeal was still pending before ANCAB because of appellant's motions to suspend consideration of it, BLM lacked jurisdiction to make a determination of navigability until the case was returned within its jurisdiction, and the attempted 1980 "appeal" from that determination was simply premature and invalid. Although ANCAB shortly thereafter remanded the case to BLM, no actual decision was issued until June 15, 1982. Since there was no valid appeal of the issue of navigability prior to December 2, 1980, this Board lacks jurisdiction to consider appellant's appeal to the extent that it rests on that issue. Contrary to BLM's assertion, however, this does not warrant dismissal of the entire appeal, since appellant has raised issues other than those relating to navigability.

Appellant contends that even if Black Lake is navigable, the submerged lands beneath it were available for selection. Appellant asserts that the existence of aboriginal title to the lake precluded passage of title to the land beneath the lake to the State of Alaska under the Statehood Act. Accordingly, appellant argues, the bed of Black Lake was Federal land available for selection.

[2] The statute under which the subject applications were filed contains the following provision: "All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished." 43 U.S.C. § 1603(b) (1976). In State of Alaska, 41 IBLA 315, 321-23, 86 I.D. 361 (1979), we determined that claims based solely on aboriginal occupancy could no longer serve as a bar for State selections under the Alaska Statehood Act. See also United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (D. Alaska 1977), aff'd, 612 F.2d 1132 (9th Cir.), cert. denied, 449 U.S. 888 (1980).

In United States v. Atlantic Richfield Co., 612 F.2d 1132, 1134 (9th Cir. 1980), the Court said, "We hold that the Act extinguished not only the aboriginal title of all Alaska Natives, but also every claim 'based on' aboriginal title in the sense that the past or present existence of aboriginal title is an element of the claim." The gravamen of appellant's argument is that its aboriginal title to the bed of this navigable waterway operated as a barrier to its automatic acquisition by the State under the Statehood Act in 1958. Even assuming, arguendo, that it did (a factual issue not proven), that barrier was eliminated by the passage of ANCSA, so that appellant's present claim is one "based on aboriginal title in the sense that the past * * * existence of aboriginal title is an element of the claim." In view of the unqualified rejection of such claims by the Court of Appeals, this Board can find no merit in appellant's argument.

Appellant contends that it was wrong for BLM to reject its applications in their entirety since some of the land was upland, not part of the lake bottom. Appellant has attached a map indicating that there is land in sec. 7,

T. 43 S., R. 61 W., Seward meridian, and in sec. 9, T. 43 S., R. 62 W., Seward meridian, that is upland. The difficulty arises because BLM's protraction diagrams, which were the basis for the original selection applications, do not show any uplands in secs. 7 or 9. Appellant expresses its concerns arising from this discrepancy as follows:

Chignik River Limited, in selection applications AA-12415 and AA-12416, selected all 27 sections of land bordering Black Lake, including Sections 7 and 9; this selection pattern shows a clear intention to acquire all lands riparian to Black Lake. The uplands in all of these sections, except Sections 7 and 9, were approved for conveyance to Chignik River Limited in the 1/13/72 [Decision to Issue Conveyance] and have been interimly [sic] conveyed to Chignik River Limited and BBNC.

However, the 1/13/72 DIC, by failing to list Sections 7 and 9 as approved for conveyance under ANCSA, could be interpreted to be an implicit rejection of Chignik River Limited's selection of Sections 7 and 9. Presumably, BLM's failure to approve Sections 7 and 9 for selection was done in reliance on the status plats, rather than on the attached topographic map which shows Sections 7 and 9 to include uplands.

It is well known that there are inaccuracies in topographic maps and status plats for remote Alaska, because both are based on aerial photography rather than on ground surveys. Accordingly, Chignik River Limited's selections of Sections 7 and 9 should not be prejudiced because of status plat errors or BLM's apparent assumption that Sections 7 and 9 contain no uplands. However, until Sections 7 and 9 have been approved for conveyance to Chignik River Limited, BBNC's § 14(h)(8) selections of uplands in Sections 7 and 9 should not be rejected. To hold otherwise could improperly and adversely impact Native corporations' pattern of land holdings around Black Lake.

(Statement of Reasons at 6-7).

[3] We appreciate appellant's concern about not receiving a conveyance of uplands solely because of a discrepancy in the maps. Nevertheless, this provides no basis for overturning the decision below. The Alaska Native Claims Settlement Act requires that selections and conveyances be as shown on current plats of survey or protraction diagrams of BLM when such protraction diagrams are available. 43 U.S.C. § 1612(b) (1976). The fact that other maps may be in disagreement with the protraction diagrams provides no basis for disregarding the statutory requirement. However, appellant will not suffer as a result of this. If the sections are later surveyed and found to contain such uplands, the patent will be conformed to the results of the survey so that the conveyance will include such uplands. See 43 CFR 2650.5-6.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

